IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

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| John Van Stry,<br><br>*Plaintiff,*<br><br>v.<br><br>Travis Robert McCrea,<br><br>*Defendant*. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Case No. 2:19-cv-00104-WCB<br><br>Jury |

PLAINTIFF'S MOTION TO COMPEL DEFENDANT TO RESPOND TO INTERROGATORIES AND REQUESTS FOR PRODUCTION

Per Rule 37(2)(B)(iii)–(iv), Plaintiff moves to compel Defendant to provide full answers to interrogatories Plaintiff submitted under Rule 33 and to produce all documents responsive to requests for production ("RFPs") Plaintiff requested under Rule 34 by a date certain, a date set to allow Plaintiff time to review the discovery, and schedule Defendant's deposition ahead of the close of discovery, January 16, 2020.[1]

[1] Plaintiff is not requesting Defendant be compelled to answer Plaintiff's requests for admissions ("RFAs"), as they have been deemed admitted, FED. R. CIV. P. 36(a)(3), but has included notice to *pro se* Defendant in the proposed order that it is Defendant's burden to move the Court should Defendant wish to have the admitted RFAs be withdrawn or amended, *id.* 36(b).

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## IV. INTRODUCTION

Plaintiff was very much appreciative of the Court's statement at the initial scheduling conference that "I am going to do the best I can to keep the cost of this proceeding as low as possible, consistent with fairness to both sides." [Aug. 6, 2019 Hr'g Audio (hereinafter *Sched. Conf.*) 0:51:34 to 0:51:44.] To that end, when Plaintiff suggested a 6-month discovery period, the Court responded that "[s]ix months seems to me to be quite a lot . . . but I think something like four or five months is probably going to be adequate." [*Id.* 0:58:00 to 0:58:33.] However, the Court's view of a reasonable discovery period was predicated on Defendant's cooperation with the discovery process. [*Id.* 1:00:01 to 1:00:11 ("I am going to trust . . . on your part Mr. McCrea, to answer the discovery questions, both the requests for documents and interrogatories, promptly and fully.").] The Court's trust in Defendant has been proven misplaced.

As explained in this motion, Defendant has been acting at cross-purposes with the Court; bringing all progress in the case to a standstill by providing no response to discovery requests, much less any discovery; delaying by habitually requiring weeks and numerous emails from Plaintiff before Defendant responds to simple inquiries, such as indicating whether Defendant received the discovery requests; needlessly driving up costs by, for example, (1) propounding discovery that Defendant never collected, and (2) proposing a settlement requiring Plaintiff's counsel to draft an agreement quickly, and then ignoring

communications from Plaintiff regarding the same once drafted.

The only thing that appears to motivate Defendant to make this litigation a priority is a deadline from this Court,[2] so Plaintiff is asking that the Court at least issue a tough but reasonable one to fully provide the requested discovery in light of the schedule, the time already afforded to Defendant, and the indicia of Defendant's intent to delay and lack of good faith dealing in this proceeding.

## V. FACTUAL BACKGROUND

### A. Defendant's Failure to Answer Plaintiff's Requests for Discovery and Lack of Communication Regarding the Same

August 6, 2019, Defendant requested service by email. [*Sched. Conf.* 1:01:10 to 1:01:27 ("Second of all—this is more to opposing counsel but . . . by physical mail or phone call, just due to the nature of everything, I've stopped . . . like stopped checking physical mail and I've stopped receiving/taking phone calls, so email me and you will get a response from me.")].

September 26, 2019, Plaintiff served Defendant with discovery requests [Ex. 1 at 3], including interrogatories [*id.* at 3–9], RFPs [*id.* at 10–19], and RFAs[3] [*id.* at 20–28]. The email accompanying the discovery requests also

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[2] For example, the Defendant refused to provide an answer until the Court set a deadline to do so. [##31–32]

[3] Given Defendant is proceeding *pro se*, Plaintiff put a clear warning in the first paragraph on the cover of the RFAs that "[u]nder Rule 36, a matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney." [*Id.* at 20.]

asked for Defendant's availability to sit for a deposition at a date set for a time "after we have received your answers to the discovery." [*Id.* at 2.]

October 22, 2019, after hearing no response from Defendant regarding his deposition availability for about a month, Plaintiff served a deposition notice for December 10, 2019 [Ex. 2 at 3–4], to which Defendant replied [*id.* at 4], with a cover that included the original email indicating discovery had been served September 26, 2019 [*id.* at 5]. October 23, 2019, Plaintiff let Defendant know that the deposition date was set "to give us time to review your discovery responses beforehand," and explicitly reminded Defendant that Defendant's discovery responses were due October 28, 2019. [*Id.* at 4.] Defendant did not indicate he was unaware of the referenced discovery.

October 30, 2019, after Defendant missed his deadline to respond to Plaintiff's discovery requests, Plaintiff sent an email to Defendant asking why Defendant did not respond. [Ex. 3 at 5.] Despite Plaintiff having reminded Defendant the week before that Defendant's discovery responses were due, Defendant responded the same day, "I have not seen a request for discovery from you." [Ex. 3 at 4.]

October 31, 2019, Plaintiff re-sent the original discovery via email [*id.* at 3–4], by U.S. International First Class, and by U.S. International Registered Mail [Ex. 4 at 2–7], and asked Defendant to confirm Defendant received the original

requests September 26, 2019 [Ex. 3 at 3–4].

November 7, 2019, having heard no response for seven days, Plaintiff asked a second time for Defendant to confirm he received the discovery September 26, 2019. [*Id.* at 3].

November 13, 2019, the U.S. Postal Service confirmed receipt of the re-sent discovery by registered mail. [Ex. 4 at 8–10.]

November 14, 2019, having heard no response for fourteen days, Plaintiff asked a third time for Defendant to confirm he receive the discovery September 26, 2019. [Ex. 3 at 3]

On November 18, 2019, fifty-three days after being served with discovery requests, twenty-seven days after being reminded that Defendant's discovery was due, after eighteen days where Plaintiff sent three emails reminding Defendant that his discovery responses were past due and asking Defendant to confirm receipt of the original discovery request, Defendant confirmed "Yes, I received them." [*Id.* at 2.] Defendant simultaneously indicated that Defendant had not read the contents of the requests, and asked Plaintiff's counsel to advise Defendant what was being asked of, and from, Defendant. [*Id.* at 2–3.]

The same day, November 18, 2019, Plaintiff's counsel responded that they were unable to provide Defendant legal advice, that Plaintiff believed the

requests were self-explanatory, and given the case schedule,[4] and despite the seriously overdue discovery, Plaintiff was willing to give Defendant another chance to provide all the requested discovery, giving Defendant until November 22, 2019, to confirm that Defendant would comply with his discovery obligations by December 6, 2019. [*Id.*] Defendant did not respond by the deadline.

**B. Defendant's Uncollected Discovery**

September 10, 2019, Defendant served [Ex. 5] and filed [#30] requests for production ("RFPs"). In response, Plaintiff gathered and processed approximately 35,000 pages of documents and worked to obtain a protective order to prevent Mr. Van Stry, Mr. McCrea's, and third-parties' sensitive information from unnecessarily becoming public. [##33, 35–38.]

October 10, 2019, Plaintiff served its responses and objections to Defendant's RFPs. [Ex. 6 at 2–9.] October 17, 2019, Plaintiff provided Defendant with Plaintiff's privilege log. [*Id.* at 10.]

October 24, 2019, the Court granted Plaintiff's motion for a protective order. [#37.] October 31, 2019, Plaintiff let Defendant know that the production in response to Defendant's RFPs would be provided upon receiving Defendant's agreement to the protective order. [Ex. 7.]

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[4] Discovery closes January 16, 2020 and Dispositive motions are due February 3, 2020 [#23 at 2].

As of this writing, Defendant has not responded to Plaintiff's email or provided his agreement to abide by the terms of the protective order.

### C. Defendant's Suggested Settlement, Followed by Defendant's Silence towards Plaintiff Regarding the Same

October 4, 2019, Defendant made a settlement offer to Plaintiff. [Ex. 8 at 2.] Plaintiff is respecting the confidentiality of the specifics of the offer, but for the purposes of this motion it is important to note that Defendant's offer required Plaintiff's counsel to draft the settlement agreement by October 11, 2019.

Plaintiff accepted Defendant's terms and expended the resources to have Plaintiff's attorneys draft and send Defendant the settlement agreement October 7, 2019. [*Id.* at 3.]

After hearing nothing from Defendant, and wishing to avoid upcoming litigation expenses in light of the pending settlement, Plaintiff's counsel reached out to Defendant, October 9, 2019, asking Defendant to confirm receipt of the agreement and asking for an expected reply date. [*Id.* at 4.]

October 15, 2019 (after Defendant's deadline had passed), and again hearing no response from Defendant, Plaintiff's counsel wrote Defendant and gave a deadline of October 18, 2019 to go forward with Defendant's proposed settlement. [*Id.* at 6–7.]

October 18, 2019, Defendant finally got back to Plaintiff and requested a change to the settlement agreement [*id.* at 6], so, the same day, Plaintiff's

counsel made the change to the agreement, and asked that Defendant execute the final agreement by October 21, 2019. [*Id.* at 5.] October 23, 2019, having heard nothing from Defendant yet again, Plaintiff asked, "If there is some impediment to executing the agreement, please let us know." [*Id.* at 8.] Defendant never responded.

## VI. LEGAL STANDARDS

"The right of self-representation is not . . . a license not to comply with relevant rules of procedural . . . law." *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). "One who proceeds *pro se* with full knowledge and understanding of the risks involved acquires no greater rights than a litigant represented by a lawyer." *See, e.g.*, *Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir. 1981).

"A party seeking discovery may move for an order compelling an answer . . [or] production . . . if . . . (iii) a party fails to answer an interrogatory submitted under Rule 33; or (iv) a party fails to produce documents . . . as requested under Rule 34." FED. R. CIV. P. 37(a)(3)(B).

"If a party . . . fails to obey an order to provide or permit discovery . . . the court where the action is pending may issue further just orders . . . [up to and] include[ing] . . . rendering a default judgment against the disobedient party." FED. R. CIV. P. 37(b)(2)(A).

## VII. ARGUMENT

### A. Defendant's Failure to Participate in Discovery Is Egregious and Warrants Remedial Measures

#### 1. Mr. McCrea Was Properly Served the Discovery Requests

Plaintiff served its discovery requests September 26, 2019 [Ex. 1 at 2] electronically as Defendant requested [*Sched. Conf.* 1:01:10 to 1:01:27] and as Mr. McCrea served Plaintiff with discovery requests [Ex. 5 at 2]. After Plaintiff sent an email once a week for three weeks asking for confirmation that Mr. McCrea "received the discovery requests on September 26, 2019," Mr. McCrea responded, "Yes, I received them."[5] [Ex. 3 at 2–4.]

#### 2. Mr. McCrea Provides No Legitimate Reason for Not Answering and Appears to Be Avoiding Reading the Requests

Mr. McCrea offers no excuse for why he did not respond to discovery served in September, only indicating that he received notice at the beginning of November that his lease is terminating in 30 days. Assuming this is true,[6] this notice was after the discovery responses were due, so does not explain why Mr.

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[5] Given Defendant's initial wordplay regarding his reception of the discovery requests [*id.* at 4], Plaintiff thought Mr. McCrea was going to deny receiving the requests, Plaintiff so sent the requests again via email and by registered mail, and has the receipts that Mr. McCrea received the discovery [Ex. 4 at 8–10].

[6] Mr. McCrea has a history of providing misinformation, such as issuing a false public statement that Mr. McCrea left a company called Dice Bard in an attempt to stop Mr. McCrea's negative publicity from affecting the company. [*Compare* Ex. 10 at 2–3 (explaining Mr. McCrea's "departure") with *id.* at 3–4 (exposing that the statement was a "huge lie" by Mr. McCrea's ex-girlfriend) and Ex. 11 at 22 (posting that Mr. McCrea would be manning the Dice Bard booth at a convention after his so-called departure).]

McCrea did not respond to the discovery requests. [*Id.* at 2.]

More troubling, Mr. McCrea's response seems to indicate that Defendant has not bothered to read any of the requests, saying "so I haven't seen them." [*Id.*] Indeed, Defendant suggests Plaintiff's counsel to provide an "email that generally states what you are requesting from me" or a phone call to "discuss what you need and want" [*Id.* at 3], nonsensical suggestions if Defendant read the discovery requests that provided this very information in plain English.

**3. Mr. McCrea Is Simply Failing to Prioritize this Litigation**

Mr. McCrea ends his email by saying that if Plaintiff is unwilling to send the suggested email or participate on a phone call that "you will have to wait until I have my living situation settled" [*id.*], consistent with the entire tone of the email that, to Plaintiff, indicates Mr. McCrea feels annoyance that his obligations in this litigation are interrupting his time for "packing, working, and moving" [*id.* at 2].

First, in Plaintiff's view, the importance of participating in a federal lawsuit is at least on par with moving and working. Indeed, Mr. McCrea made time to post over 100 times to Reddit in October and November 2019 [Ex. 11 at 2–22], regarding everything from his napping activity [*id.* at 12] to how to get around copyright [*id.* at 20], dispelling his contention he did not have time to respond to many emails from Plaintiff or work on discovery responses.

Second, Mr. McCrea has been aware of his discovery obligations since the beginning of August, so they should come as no surprise. [*Sched. Conf.* 0:54:40 to 0:54:49 (asking Mr. McCrea, "Do you understand the concept of legal discovery—production of documents and depositions in particular? Do you have an idea of what that entails?" to which Mr. McCrea answered, "Yes, your honor.").]

Third, Mr. McCrea propounded his own discovery to Mr. Van Stry (which appears to have been done solely to harass as discussed further below) that likewise interrupted Mr. Van Stry's life and work, so Defendant cannot be heard to complaint that Defendant too must provide discovery.

Fourth, any inconvenience to Mr. McCrea is a problem of his own making, one which he should have expected, considering Mr. McCrea chose to run one of the largest e-book pirate websites in the world [#11–4 at 13 (touting about 21 million books distributed in one year)], chose to ignore authors', including Mr. Van Stry's, requests to stop [#27–1], chose to dare authors to sue him [#1 ¶99 ("I welcome it. I'm begging someone to do it. Let me show in court what I have been saying this entire time so then we can end the bullshit.")], and chose to participate *pro se* [#17–5 at 2 ("For years I have been ready to fight and have always planned on representing myself in court."); *see also Sched. Conf.* 0:02:51 to 0:04:00 (affirming that "I understand that [lack of counsel would be a

disadvantage], and for now I will continue *pro se*" )].

Fifth, and finally, Mr. McCrea did not let Plaintiff or the Court know of any difficulties Defendant would have in responding a head of time, for example when Plaintiff reminded Defendant of Defendant's discovery deadline. To the contrary, even after the deadline passed, getting Defendant to merely reply to a request to confirm Defendant received the discovery in September was extremely difficult to do. Defendant's actions are not consistent with a party cooperating in the discovery process, but suggest to Plaintiff an attempt to delay.

**4. The Court Should at least Set a Quick Deadline to Respond**

Because Mr. McCrea's discovery responses are now egregiously late, Defendant has not provided any good cause for failing to respond, getting any communication from Defendant regarding discovery (or any matter) has been "like pulling teeth," and this Court has already cautioned Mr. McCrea that his slow responses and other activity showing he is "insufficiently attentive to this litigation . . . may result in the imposition of sanctions" [#34 at 3–4], Plaintiff asks the Court to set a short deadline—in light of the length of time already provided to Defendant, the schedule in this case, and Defendant's behavior—for Defendant to provide complete answers and production to the outstanding requests.

**B. Other Indicia of Defendant's Lack of Good Faith Participation**

Beyond Defendant's behavior directly regarding Plaintiff's discovery

requests, Plaintiff also would like to discuss other items concerning Defendant's behavior in this litigation that also support Plaintiff's belief that, despite Defendant's statement that he intends to someday send reasonable discovery Plaintiff's "way" [Ex. 3 at 3], Plaintiff has zero confidence that Mr. McCrea intends to provide real and complete discovery.

**1. Mr. McCrea's Early Empty Threats**

After this lawsuit was filed, Mr. McCrea did not react as a typical non-lawyer might; instead, Mr. McCrea's gambit was a promise to file an answer by 6AM the next day with a countersuit for liable, as well as a motion to transfer and motion to dismiss, unless Plaintiff agreed to a "30 day extension to the answer deadline to discuss a settlement." [Ex. 9 at 2.] When Plaintiff inquired what were Defendant's bases for change of venue and dismissal, Defendant never replied. Defendant did not file anything by 6AM the next day, and has never filed a countersuit for liable. This was the first indication that Mr. McCrea's way of operating is through attempted intimidation and false promises.

**2. Failure to Follow-Through with a Promise to Court**

As the Court already noted, Mr. McCrea never filed the readable notice from Mr. Van Stry's attorney as Mr. McCrea represented to the Court he would. [#34 at 4.] Perhaps a small matter in isolation, but this is another piece of evidence that Mr. McCrea is not a man of his word.

### 3. Mr. McCrea's Discovery Requests Apparently Put Forth Just to Harass

Mr. McCrea has no counterclaims, and, at the initial scheduling conference, indicated that he was simply going to rely upon his affirmative defense of compliance with the DMCA safe harbor provisions. Given this position, it is unsurprising that Mr. McCrea told the Court that he would not be requesting any discovery. [*Sched. Conf.* 0:57:15 to 0:57:29.]

It was therefore somewhat surprising that Mr. McCrea sent RFPs [Ex. 5], but Plaintiff dutifully served its responses [Ex. 6 at 2–9], gathered and processed tens of thousands of pages, complied and provided Defendant with Plaintiff's privilege log [*id.* at 10], and sought and obtained a protective order from the Court in light of the requests [##33, 35–38]. But Defendant did not even bother to reply to Plaintiff's request that Defendant agree to the protective order. [Ex. 7.] That is, Defendant has shown no interest in getting the discovery, leading to the natural inference that Defendant only propounded the discovery so it would cause Plaintiff harm and perhaps thinking Plaintiff would drop the case (similar to Mr. McCrea's empty countersuit threat for liable discussed above.)

Indeed, the telling aspect of Mr. McCrea's email serving discovery was that it was one line beginning with, "That should get me started . . ." Besides the disrespectful tone, the message from Defendant is that he was just getting "started," and intended to propound additional requests in the future. Plaintiff received the

clear implied message that Defendant was again posturing that Defendant was going to make this litigation burdensome.

**4. Mr. McCrea's Bad Faith Settlement Game**

Lastly, two months ago Defendant made a settlement offer to Plaintiff. [Ex. 8 at 2.] The offer mandated that Plaintiff's counsel draft the contract within 7 days. Plaintiff accepted, and Plaintiff's counsel worked expeditiously to get the contract incorporating Defendant's terms to Defendant in three days. [*Id.* at 3.] In typical fashion it took three emails over fourteen days, including a deadline to respond, before Defendant finally responded at the deadline requesting one change. [*Id.* at 3–8.] After Plaintiff's counsel made the change the same day it was requested, and sent an email five days later asking Defendant, "If there is some impediment to executing the agreement, please let us know," Mr. McCrea never responded.

Plaintiff can only speculate why Mr. McCrea would propose a settlement, making Plaintiff's counsel scramble in order to achieve the objective after Plaintiff agreed to the settlement, and then ignore communications regarding the same, but such speculation by Plaintiff leads only to harmful motives on Mr. McCrea's part.

## VIII. CONCLUSION

At the Scheduling Conference, the Court made it clear that it worried Plaintiff's counsel might be abusive of the *pro se* Defendant [*Sched. Conf.*

0:59:10 to 0:59:30], but it is Defendant who communicates in an unprofessional manner, appears to have used the discovery process merely to harass, appears to Plaintiff to be "playing games" to incite consternation, and, as the Court noted, generally "not being sufficiently attentive to his responsibilities in this litigation" [#34 at 4] (an understatement).

Plaintiff is asking the Court to recognize Mr. McCrea's behavior as unacceptable, and asking that Mr. McCrea be given a tight and strict deadline to fully respond to the interrogatories and RFPs or face consequences.

Dated: November 23, 2019

s/Joshua S. Wyde/

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## CERTIFICATE OF SERVICE

I certify that on November 23, 2019, I served the foregoing "PLAINTIFF'S MOTION TO COMPEL DEFENDANT TO RESPOND TO INTERROGATORIES AND REQUESTS FOR PRODUCTION" on Defendant Mr. Travis Robert McCrea at the email address

teamcoltra@gmail.com, per agreement to electronic service, and also sent a copy via U.S. International Mail to the following address:

Travis Robert McCrea
2140 Waterloo St
Vancouver BC VGR3G9
Canada

Dated: November 23, 2019

s/Joshua S. Wyde/
Joshua S. Wyde

**CERTIFICATE OF CONFERENCE**

I certify that from October 30, 2019, two days after Defendant missed his discovery deadline, until now, Plaintiff has done its best to initiate a discussion regarding why Plaintiff failed to respond to the discovery requests and see if some resolution could be had. However, Plaintiff has only been met with silence, implausible denials, and delay. At first, Defendant's response had been to say he "hadn't seen" discovery requests, despite the requests being referenced by Plaintiff a couple of times with no questioning from Defendant, such as "what discovery?", and Defendant then acknowledged the requests, but noted that Defendant had not read the requests, and asked Plaintiff to tell Defendant what Plaintiff "need[s] and want[s]—items spelled out in the unread requests—or that Plaintiff "will have to wait until I have my living situation settled." Given the quickly approaching case deadlines, Plaintiff gave Defendant one last chance to state that he would provide discovery, though egregiously delayed, by November 22, 2019. Defendant failed to respond. Plaintiff believes it has done all that it can do meet its obligation to try and obtain the discovery without Court action, and that Defendant is simply obstructing and delaying without any real intent to meet its discovery obligations.

Dated: November 23, 2019

s/Joshua S. Wyde/
Joshua S. Wyde